Supreme Court, U.S.
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No.

In the Supreme Court of the United States

KIKI IKOSSI,

Petitioner,

v.

BOARD OF SUPERVISORS OF THE LOUISIANA STATE UNIVERSITY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What constitutes "reckless disregard" for purposes of showing a willful violation of the Equal Pay Act?

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August 18, 2007.

DISTRICT COURT

United States District Court for the
Middle District of Louisiana
Kiki Ikossi-Anastasiou v. Bd. of Supervisors of La. State Univ.,
Civil Action No. 00-883
September 26, 2006

STATEMENT OF JURISDICTION

The United States Court of Appeal for the Fifth Circuit filed its decision on August 18, 2009. This Petition for Writ of Certiorari is filed within 90 days of the filing of that decision. The United States Supreme Court's jurisdiction is invoked pursuant to 28 USCS § 1254 providing in pertinent part: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

STATUTES INVOLVED

29 USC 206(d)

29 USC 255(a)

5 C.F.R. § 551.104

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

Kiki Ikossi, Ph.D., brought a suit against her former employer, the Board of Supervisors of the Louisiana State University (LSU), alleging that her employment had been terminated in violation of Title VII of the Civil Rights Act and the equivalent Louisiana anti-discrimination laws. Dr. Ikossi further brought an action under the Equal Pay Act alleging that male professors performing the same work as her received better compensation, in violation of 29 USC 206(d). During the pre-trial conference, and over plaintiff's counsel's objections, the district court allowed LSU to file a motion for summary judgment despite the fact that defendant's deadline to do so had already passed. LSU thus filed a Motion for Summary Judgment seeking dismissal of all plaintiff's claims, which the district court granted on September 26, 2006. Dr. Ikossi timely appealed the judgment dismissing her case to the Fifth Circuit Court of Appeals on October 23, 2006. On August 18, 2009, the appellate court affirmed summary judgment in favor of LSU on plaintiff's claims of discrimination under Title VII of the Civil Rights Act, plaintiff's state law claims, as well as on plaintiff's Equal Pay Act claim. The Fifth Circuit reversed and remanded Dr. Ikossi's claim of retaliation under Title VII of the Civil Rights Act. Dr. Ikossi now seeks that the Supreme Court reverse and remand the lower courts' findings on her Equal Pay Act claim.

B. KIKI IKOSSI'S EVIDENCE OF EQUAL PAY VIOLATIONS

Throughout her employment at LSU, Dr. Ikossi was consistently paid less than her male colleagues engaging in identical work. In order to show that she was less paid, Dr. Ikossi put forth LSU's budget, showing that similarly situated male colleagues performing work of similar skill, effort and responsibility, received better wages. She also put forth evidence showing that the same male colleagues routinely received higher merit increases than she did. Dr. Ikossi also filed internal grievances complaining that she was being paid less than similarly situated male professors. The pay disparity was established while Dr. Ikossi was performing as a full-time, tenure professor at LSU. Dr. Ikossi was granted sabbatical leave for the period August, 1997 – May, 1998. During this time she received half of her regular pay. As her pay was based on a discriminatory scheme, half of her pay, which she received while on sabbatical leave, was likewise discriminatory. Dr. Ikossi continued on full-time pay between May and August, 1998, when she took unpaid leave pursuant to the Family Medical Leave Act in order to care for her son. Dr. Ikossi was denied leave without pay for the 1999 spring semester, which she needed due to her son's continued medical condition. LSU claimed Dr. Ikossi abandoned her position and terminated her employment.

C. DEFENDANTS' EVIDENCE OF A LEGITIMATE REASON

Defendant provided absolutely no reason, legitimate or otherwise, for its decision to pay Dr. Ikossi less than similarly situated male professors. Instead, LSU stated that Dr. Ikossi's last paycheck was received in May, 1997, before she began her sabbatical leave, and that her lawsuit, filed in November, 2000, exceeded both the two and the three-year statutes of limitation.

D. THE DISTRICT COURT RULING

The District Court found that plaintiff's last check was, as LSU had argued, in May, 1997, and that she filed her suit more than three years later, thus failing to meet the statute of limitation, even under a "willful" standard.

E. THE COURT OF APPEALS

The Fifth Circuit Court of Appeals found that Dr. Ikossi's Equal Pay Act claim accrued in August, 1998, when she received her last sabbatical leave paycheck. Nonetheless, the appellate court found that LSU had not acted willfully in violating the EPA and thus rejected Dr. Ikoss's argument that a three-year prescriptive period applied. Thus, the court of appeals deemed Dr. Ikossi's EPA claim to have prescribed in August, 2000, based on the two-year statute of limitations. The appellate court affirmed the finding of no willful violations of the

EPA despite evidence that LSU was aware of the pay disparities, and despite the fact that LSU had put forth absolutely no reason, legitimate or otherwise, in order to explain the disparity.

ARGUMENT

1. What constitutes "reckless disregard of the matter" for purposes of a "willful" violation of the Equal Pay Act.

In its opinion affirming the lower court's application of the two-year prescription, the Fifth Circuit Court of Appeals stated that "...the facts that Ikossi was paid less than many of her male colleagues and that LSU knew she was dissatisfied with this difference are not enough to raise a fact question as to whether LSU knew or recklessly disregarded that its pay scale was prohibited by the FLSA." *Ikossi,* at 553. Various courts across the United States have interpreted the "reckless disregard" differently from one another.

The Code of Federal Regulations defines reckless disregard as the "failure to make adequate inquiry into whether conduct is in compliance with the Act." 5 C.F.R. § 551.104. *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1163 (11th Cir. Fla. 2008).

Donovan v. M & M Wrecker Service, Inc., 733 F.2d 83, 84 (10th Cir. Okla. 1984), reversed a lower court's finding that "...an employer is guilty

of a willful violation only if it intentionally disregarded or was plainly indifferent to the law or its requirements." In so doing, the 10th Circuit, supra, at 85, opined that "...we rejected that view and held that a violation is willful if the employer knew or should have known of an appreciable possibility that the employees involved were covered by the Act."

The Ninth Circuit adopted an even broader standard:

> We agree that an employer should not be relieved of its statutory obligation to pay its employees overtime compensation merely because of its own error. Nor should an employer's assertion of ignorance of the Act's requirements be sufficient to negate willfulness.

Marshall v. Union Pacific Motor Freight Co., 650 F.2d 1085, 1092 (9th Cir. Cal. 1981). The Ninth Circuit further adopted the following standard for willful violations: A violation is willful when the employer was, or should have been, cognizant of an appreciable possibility that the employees involved were covered by the statutory provisions." *Marshall*, supra, at 1092.

Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 461 (D.C. Cir. 1976), explains that the Equal Pay Act (EPA) is a remedial statute which should be "liberally construed in favor of their intended beneficiaries." Thus, the DC Circuit, supra, at 461,

rejected a definition of "willful" that "...would demand proof that the employer entertained a bad purpose or an evil intent." On the contrary, "...the employer's noncompliance is 'willful' when he is cognizant of an appreciable possibility that he may be subject to the statutory requirements and fails to take steps reasonably calculated to resolve the doubt."

EEOC v. Delaware Dep't of Health & Social Services, 865 F.2d 1408, 1419 (3d Cir. 1989), reversed a lower court's dismissal of a jury's finding of willful violation under the EPA. There, the employer stated that a complaint of sex discrimination, along with one of unequal pay, would have prompted him to think that an EPA violation may have occurred. However, the employees' complaint, supra, at 1419, only stated "equal pay for equal work." The Third Circuit found this to be sufficient to cause the employer to suspect that a violation existed, especially in light of the fact that the complainants were female, and their named comparator was a male. Id. In so finding, the Third Circuit stated:

> The jury could have drawn the inference which the EEOC asserts is warranted--that Dillman, personnel director for the State of Delaware, must have entertained a strong suspicion of an Equal Pay Act violation which, with the most cursory investigation, would have led to actual knowledge. An experienced, responsible official cannot consciously

> turn his head and choose to ignore such information. If he does, his actions meet the standard of willfulness set forth in *Richland Shoe*.

Id., at 1419, citing *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 108 S. Ct. 1677, 100 L. Ed. 2d 115 (1988).

Cooke v. United States, 85 Fed. Cl. 325 (Fed. Cl. 2008), encountered a situation similar to that of Kiki Ikossi. The Cooke plaintiff, supra, at 85-86, "...may not have spelled out to Ms. Engleman Connors that her grievance related to gender bias, but nothing under the law required her to do so." Nonetheless, her complaints informed the employer that "...her pay fell short of that earned by her comparators, who were all male." Id., at 86. *Cooke*, supra, at 87, found that, based on the plaintiff's complaints, "Ms. Engleman Connors was sufficiently on notice of the pay disparity between a female employee and her male comparators, and yet she failed to investigate the Equal Pay Act's requirements." The court found that the defendant's failure to adequately inquire into its possible violation of the EPA "...demonstrated a reckless disregard of the Equal Pay Act's requirements." Id., at 85. Similarly, Dr. Ikossi filed several grievances that "...refer to Ikossi's dissatisfaction with her salary and include a request from Ikossi that her salary be adjusted upward to the level of her male colleagues." *Ikossi*, at 553. Dr. Ikossi's grievances should have put defendant on notice that it was possibly violating the EPA in order to trigger an adequate inquiry as

required by 5 C.F.R. § 551.104. LSU did not make such an inquiry, thus demonstrating a reckless disregard for plaintiff's rights. *Cooke*, supra, at 85-87.

Reich v. Department of Conservation & Natural Resources, 28 F.3d 1076, 1083 (11th Cir. 1994), on the other hand, refused to find a willful violation of the Fair Labor Standards Act (FLSA) where the defendant knew that some of its employees had worked overtime and even told them not to report any hours worked above 40 per week. The 11th Circuit, supra, at 1084, found that the employer's "...failure to rectify this troublesome situation can better be described as resulting from negligence rather than from willfulness."

Stillman v. Staples, Inc., 2009 U.S. Dist. LEXIS 42247 (D.N.J. May 11, 2009), found reckless disregard where the employer knew that its managers spent considerable time performing labor that was not exempt from FLSA.

Ketchum v. City of Vallejo, 523 F. Supp. 2d 1150, 1158 (E.D. Cal. 2007), found that genuine issues of fact remained where the defendant failed to pay its employees overtime as required by FLSA. The Court's refusal to grant summary judgment was based on the fact that the employer relied on a letter from the Department of Labor exempting some of its employees from overtime pay, but being silent as to any requirements under the FLSA regarding other activities inquired about by the defendant. The court found that the employer had a duty to make an adequate inquiry as to the LFSA

requirements as to the remaining issues not included in the Department of Labor's letter, and its failure to do so raised a genuine issue of fact as to whether it engaged in reckless disregard as to whether its conduct was prohibited by the statute.

CONCLUSION

Courts across the country have established various definitions for what constitutes "reckless disregard." The Fifth Circuit appears to construe this element as a blatant and knowing refusal to comply with the Equal Pay Act, as evidenced by the appellate court's use of *Singer vs City of Waco,* 324 F.3d 813, 821-22 (5th Cir. 2003) and *Reich vs Bay, Inc.,* 23 F.3d 110,117 (5th Cir. 1994), as examples of what reckless disregard may be. Specifically, the Fifth Circuit requires that an employer admit it knows of the violation and, despite advice of counsel to the contrary, the employer refuses to correct its actions. *Ikossi,* supra, at 553, fn. 24. Furthermore, the Fifth Circuit requires that plaintiffs specifically and expressly inform their employer that EPA is being violated, in order to consider that a defendant has been put on notice. *Ikossi,* at 553. However, such an action by a plaintiff is not required by the law, as explained in *Cooke,* supra, at 325. The courts have yet to rely on a more precise definition of the "reckless

disregard" required for a showing of willful violations of the EPA. This Honorable Court should now settle the matter.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT COURT

Kiki Ikossi-Anastasiou v. Bd. of Supervisors of La. State Univ., 579 F.3d 546 (5th Cir. La. 2009) August 18, 2009.

PRISCILLA R. OWEN, Circuit Judge:

Kiki Ikossi-Anastasiou (Ikossi) appeals from the district court's grant of summary judgment to Louisiana State University (LSU). We affirm in part, reverse in part, and remand for further proceedings.

I

Ikossi was a professor at LSU beginning in 1990 and a tenured professor beginning in 1996. During much of this time, she believed she was subjected to unlawful sex discrimination. Ikossi complained of her treatment on many occasions and filed formal grievances against several male colleagues in 1995.

For the 1997-1998 academic year, Ikossi requested and was granted a one-year sabbatical leave. During this leave, her sabbatical agreement required LSU to pay her half of her regular salary and benefits. Her work on sabbatical included research with the Naval Research Laboratory.

In April 1998, while on sabbatical, Ikossi again filed grievances against several male faculty

members, alleging sex discrimination and other complaints. In August 1998, after her sabbatical ended and as the new academic year was about to begin, Ikossi exchanged several letters with LSU. First, Ikossi sent a letter to Dr. Alan Marshak, her department chair, requesting "personal leave" of unspecified length, "in order to care for a member of [her] family with a health condition." Ikossi appears to have submitted standard forms further specifying the nature of the leave she was requesting, but those forms are not in the record. Later documents indicate that Ikossi's son was ill and residing out of state.

Ikossi apparently received a letter approving twelve weeks of leave under the Family Medical Leave Act (FMLA) from Marian Caillier, a human resources manager at LSU, although that letter is not in the record. Ikossi replied to Caillier acknowledging that her twelve-week FMLA leave would end mid-semester and that "to facilitate the department teaching plans" she would need additional leave. Caillier replied, acknowledging the receipt of forms requesting additional unpaid leave and stating that Marshak was only willing to approve additional unpaid leave through the end of the Fall 1998 semester because the department was "short of faculty" and "facing an enormous teaching load." Caillier concluded: "Your request for leave for the 1999 Spring Semester [beginning January 1999] is denied. Therefore, you are required to return to your assigned duties for the 1999 Spring Semester." There was no further correspondence between Ikossi and anyone from LSU for five months.

Ikossi exchanged several letters with LSU personnel in January 1999. Shortly before the start of the spring semester Ikossi sent Caillier another request for unpaid leave "for the rest of the academic year." Caillier reminded Ikossi that her request had already been denied and explained that if Ikossi did not resume her teaching duties, LSU would assume that she had "abandoned [her] position." Ikossi then sent a letter to Marshak indicating that she would not return for the spring semester and that she had "every intention of fulfilling [her] University responsibilities but [her] personal situation" required postponing those duties. She concluded with a request for personal leave without pay.

Shortly thereafter Ikossi sent another letter to Caillier explaining that she was not abandoning her position, but merely requesting leave without pay. She stated that the denial of her request was "nothing more than a progression of disparate treatment." She concluded, "I expect my request to be forwarded to the appropriate higher University authority for an impartial review." Ikossi also wrote to Dr. Daniel Fogel, Executive Vice-Chancellor and Provost and asked him to "re-examine []" her leave request.

In late January 1999, Forest Benedict, Associate Vice Chancellor of LSU, sent a letter to Ikossi in which he explained that her leave had been denied in August, that the denial had been reiterated in January, and that because she had failed to return to work at the start of the semester, she had

abandoned her position. Benedict also told Ikossi that LSU had learned that she had accepted a full-time position with the U.S. Navy, commencing the fall of 1999. Benedict reminded Ikossi that her sabbatical agreement included a clause prohibiting her from accepting a full-time position elsewhere until having worked for LSU a full year post-sabbatical. Benedict told Ikossi that LSU would determine how much reimbursement Ikossi owed in light of her breach of the sabbatical agreement.
Ikossi wrote Benedict in early February disputing the accusation that she had accepted a permanent position with the Navy. She wrote that Benedict's office never addressed any of Ikossi's past complaints about discrimination and that Ikossi considered Benedict's earlier letter "further indication of the disparate treatment" she had endured for eight years. The next communication between Ikossi and LSU in the record is an August 1999 letter from LSU's law firm to Ikossi's lawyer stating that Ikossi had only a small amount of time to settle her claims against LSU (apparently the claims that constitute the instant case) in exchange for LSU dropping its demand for $ 42,907.79 of sabbatical pay.

Ikossi filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) on a standard questionnaire form. The EEOC issued a right-to-sue letter in August 2000. Ikossi brought this suit in November 2000, alleging violations of Title VII (both discrimination and retaliation), Title IX, the Louisiana Employment Discrimination Law, and the Equal Pay Act. LSU moved for summary judgment, arguing that all

claims were time-barred. The district court agreed and granted summary judgment to LSU on all claims, and Ikossi appealed.

II

Ikossi argues that the district court erred in its analysis of the applicable limitations periods for all of her claims except the Title IX claim, which she does not challenge. We review the district court's grant of summary judgment de novo, using the same standard as the district court.[1] Summary judgment is properly granted only when there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law.[2]

III

It is unlawful under Title VII of the Civil Rights Act of 1964 for an employer to discriminate on the basis of sex.[3] A plaintiff may bring a claim for discrimination under Title VII only if she has filed a claim with the EEOC within 180 days of the alleged unlawful act, or within 300 days if the plaintiff first filed a complaint with a state or local agency.[4] The parties do not dispute that the 300-day period is applicable in this case. Ikossi filed her EEOC complaint on September 16, 1999, so her claims are timely only if the alleged unlawful acts took place on or after November 20, 1998.

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[1] *Ruiz vs Whirlpool, Inc.*, 12 F 3d 510, 513 (5th Cir., 1994)
[2] Fed. R. Civ. P. 56(c).
[3] See 42 USC 2000e-2
[4] Id. § 2000e-5(e)(1).

The district court held that an unlawful act, if any, occurred no later than when LSU sent a letter in August 1998 that denied Ikossi's additional unpaid leave request. The district court reasoned that the alleged denial of unpaid leave based on Ikossi's sex, if true, would have amounted to unlawful discrimination. In the court's view, because Ikossi's subsequent discharge in January 1999 was an inevitable consequence of the denial of unpaid leave, the January letters were not themselves discrete acts of discrimination.

Ikossi argues that she was reasonable in failing to construe the August letter from Caillier as a notice of termination because (unlike the January letter) it said nothing about job abandonment. She cites the Supreme Court's decision in *Delaware State College v. Ricks* for the proposition that the limitations period begins when the employer makes its official position known to the plaintiff.[5] She argues that the August letter did not establish LSU's position that she would be terminated if she did not return to work in January. We disagree.

The Supreme Court held in *Ricks* that the limitations period began to run when the university *offered* the professor a terminal contract, not when the terminal contract expired and the professor was actually terminated.[6] The termination was a "delayed, but inevitable consequence" of the

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[5] *See Del. State Coll. vs Ricks*, 449 US 250, 262, 101 S. Ct. 498, 66 L.Ed. 2d 431 (1980).

[6] Id., at 257-58.

terminal contract and the professor was on explicit notice that he would be terminated at its expiration.[7] Similarly, in Ikossi's case, the August letter was a denial of *unpaid* leave and it required Ikossi to return to work. This letter put Ikossi on notice that she would be terminated if she failed to return to work in January. Thus, the discriminatory act (if any) was communicated to Ikossi in August, and the January letter confirming denial of her request was not a new act of discrimination.

Ikossi contends that the August letter "did not constitute LSU's official position" because her request had not been "decided upon" by the proper authority within LSU. She argues that neither Caillier nor Marsak had the authority to approve or deny leave of the length Ikossi requested. But this argument is inconsistent with Ikossi's original complaint. Paragraph 24 of her complaint states that she requested leave in August 1998, and "[t]he university granted the leave but only for twelve weeks, and insisted that she return and resume teaching in January 1999." This is a factual admission that the University--not an unauthorized agent--denied her request for unpaid leave in August 1998. Factual assertions in the complaint are "judicial admissions conclusively binding" on the plaintiff.[8] Ikossi reaffirmed the fact of LSU's August denial in a joint pretrial stipulation. Ikossi may not now argue that she had not received a denial from the University in August 1998.

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[7] Id.

[8] *Morales vs Dept of Army*, 947 F. 2d 766, 768 (5th Cir. 1991)

Even if she were able to deny the admissions she made in her complaint and the joint pretrial stipulation, her argument is without merit. She cites a table from an LSU policy manual that assigns "Final Approval Authority" for one-semester leaves to the Vice Chancellor/Vice Provost. According to Ikossi, this demonstrates that her department chair, Marshak, lacked the power to "decide upon" her request for leave. But the table specifies the authority to grant leave resides in the Vice Chancellor/Vice Provost. It does not say that a department chair has no authority to deny leave.

For these reasons, we reject Ikossi's argument that she was not given notice of LSU's official position until January 1999. Ikossi's Title VII discrimination claims are time-barred.

IV

It is a violation of Title VII if employers retaliate against employees who complain about discrimination.[9] "In Title VII retaliation cases, the plaintiff must first make the following prima facie showing: '(1) that she engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse action.'"[10]

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[9] 42 USC 2000e-3(a); see *Burlington N. & Santa Fe Ry. Co. vs White*, 548 US 53, 126 S.Ct. 2405, 165 L. Ed. 2d 345 (2006)

[10] *Gee vs Principi*, 289 F. 3d 342, 345 (5th Cir. 2002) (quoting *Raggs vs Miss Power & Light Co.*, 278 F. 3d 463, 471 (5th Cir. 2002)) (alteration omitted)

The district court did not explicitly discuss the retaliation theory of Ikossi's Title VII claim, but dismissed all Title VII claims as time-barred, reasoning that all claims accrued on or before August 1998.

Ikossi argues that LSU's demand for repayment of her sabbatical salary was in retaliation for her complaint to Caillier alleging that LSU denied leave on the basis of her sex. Because LSU's demand for repayment occurred in January 1999, which was within the 300-day period prior to her filing of the EEOC complaint, she argues that her retaliation claim was timely. LSU does not challenge and we do not address whether Ikossi engaged in protected activity, whether the demand for repayment of salary constitutes an adverse employment action, or whether there was a causal link between the protected activity and the adverse action. LSU argues only that (1) the adverse acts occurred after the plaintiff was no longer an employee, and former employees are not covered by Title VII, and (2) the demand for repayment was part of a settlement discussion and Federal Rule of Evidence 408 bars the admission of such evidence.

First, the Supreme Court rejected the argument that Title VII retaliation claims only apply to current employees in *Robinson v. Shell Oil Co.*[11] There, the Court held that the term "employee" in the anti-retaliation provision of Title VII, 42 U.S.C. § 2000e-3(a), included former employees, noting

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[11] 519 US 337, 341-42, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997).

that limiting anti-retaliation protections to current employees would be destructive of the provision's primary purpose of "[m]aintaining unfettered access to statutory remedial mechanisms."[12] Thus, the fact that Ikossi was not employed at the time LSU made the demand for repayment is of no consequence.

Second, Rule 408 does not apply in this context. Rule 408 prohibits a party from introducing evidence of settlement negotiations when "offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction."[13] The evidence of LSU's repayment demand was a letter that Forest Benedict, Associate Vice Chancellor, sent to Ikossi at the end of January. This is the same letter that stated that her failure to return to work meant she had abandoned her position. This letter is not part of any settlement negotiations and is not excluded under Rule 408.

Because the retaliatory act occurred within the 300-day window for filing an EEOC claim, Ikossi's retaliation claim as to the demand for repayment of her sabbatical salary is timely and the district court erred in granting summary judgment on that basis.

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[12] Id. at 346.

[13] F.R.Evid. 408(a).

V

Louisiana law prohibits employment discrimination based on sex.[14] The prescriptive period for such claims is one year.[15] Prior to July 1999, the prescriptive period under Louisiana law was suspended during state or federal administrative investigations for up to eighteen months.[16] In July 1999, the Louisiana legislature reduced the maximum length of that suspension period to six months.[17]

Ikossi filed her EEOC complaint in September 1999, after the maximum suspension period changed from eighteen to six months. The parties disagree as to which suspension period applies to Ikossi's claim. LSU argues that the six-month maximum suspension period applies and that, even if Ikossi's claim accrued as of January 1999, the prescription period including the maximum suspension period would have expired prior to Ikossi filing suit in November 2000. Ikossi argues the eighteen-month suspension period should apply to her claim, since that was the law in effect when the allegedly wrongful acts took place and her claim accrued. She argues that applying the six-month maximum would retroactively and

[14] La. R.ev.Stat. 23:301 et.seq.

[15] La. Rev.Stat. 23:303(D). A prescriptive period is the civil law equivalent of a common law statute of limitation. *Trizec Props., Inc. vs Mineral Prods Co.*, 974 F. 2d 602, 603 n. 1 (5th Cir 1992).

[16] La. Rev.Stat. 23:333 (1998).

[17] La. Rev.Stat. 23 303(D).

impermissibly affect her vested property right in her claim.

In any event, we need not decide which suspension period applies here because Ikossi failed to file her EEOC complaint (and thereby trigger the suspension period) before the one-year prescription period expired. As discussed above, Ikossi's claims accrued as of August 1998. She did not file her complaint with the EEOC until, at the earliest, September 1999. Because her one-year prescriptive period had expired before she filed her complaint, no suspension of the prescription period could have occurred and, accordingly, the maximum suspension period applicable is irrelevant. Ikossi's state-law claim is time-barred.

VI

Ikossi's final claim arises under the Equal Pay Act,[18] which is part of the Fair Labor Standards Act (FLSA).[19] Claims under the FLSA, including Equal Pay Act claims, must be filed within two years after the cause of action accrues, or within three years if the alleged violation was "willful."[20] Ikossi argues that the three-year limitations period applies because LSU acted willfully.

An employer willfully violates the FLSA if it "either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the

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[18] 29 USC 206(d).
[19] 29 USC 201 *et.seq.*
[20] 29 USC 255(a)

statute."[21] Because willfulness is a question of fact,[22] summary judgment in favor of the employer is inappropriate if the plaintiff has introduced evidence sufficient to support a finding of willfulness.[23]

The only evidence Ikossi relied upon to establish willfulness before the district court was salary records for her academic department and copies of her 1995 and 1998 grievances. The salary records show that Ikossi was paid less than many of her male colleagues and that she received lower raises than many of her male colleagues. The grievances refer to Ikossi's dissatisfaction with her salary and include a request from Ikossi that her salary be adjusted upward to the level of her male colleagues. However, the facts that Ikossi was paid less than many of her male colleagues and that LSU knew she was dissatisfied with this difference are not enough to raise a fact question as to whether LSU knew or recklessly disregarded that its pay scale was prohibited by the FLSA. Ikossi has not provided evidence that LSU actually knew that the pay structure violated the FLSA, or that LSU ignored or failed to investigate Ikossi's complaints.[24] Without more evidence, Ikossi's

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[21] *McLaughlin vs Richlad Shoe Co*, 486 US 128, 133, 108 S.Ct. 1677, 100 L. Ed. 2d 115(1988).

[22] *Reich vs Tiller Helicopter Servs., Inc.*, 8 F. 3d 1018, 1036 (5th Cir. 1993); see *Mireles vs Frio Foods, Inc.*, 899 F. 2d 1407, 1416 (5th Cir. 1990) (applying a clearly erroneous standard of review to the district court's finding of no willfulness).

[23] *See Bright vs Houston Nw. Med. Ctr. Survivor, Inc.*, 934 F. 2d 671, 674 (5th Cir. 1991).

[24] *See Singer vs City of Waco*, 324 F. 3d 813, 821-22 (5th Cir. 2003) (upholding a jury finding of willfulness where the

allegations of willfulness cannot survive the summary judgment stage.

Because Ikossi has not provided evidence that LSU acted willfully, the two-year statute-of-limitations period applies. The latest date for which Ikossi argues that her Equal Pay Act claim accrued was August 1998, when she receivd her last sabbatical paycheck. She did not file suit until November 2000, which is beyond the two-year limitations period. Thus, her claim is barred.

* * *

For these reasons, we AFFIRM the district court's grant of summary judgment with respect to Ikossi's Title VII discrimination claim, Louisiana Employment Discrimination Law claim, and Equal Pay Act claim, REVERSE the grant of summary judgment on her Title VII retaliation claim, and REMAND to the district court for further proceedings consistent with this opinion.

employer admitted that it knew its employees were being paid incorrectly and the employer's attorney advised the employer not to investigate); *Reich vs Bay, Inc.* 23 F. 3d 110, 117 (5th Cir. 1994) (upholding a district court's finding of willfulness where the employer was notified by a government representative that its payment practices violated the FLSA and the employer continued those practices without further investigation.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

Kiki Ikossi-Anastasiou v. Bd. of Supervisors of La. State Univ.,
Civil Action No. 00-883
September 26, 2006

RULING ON MOTION IN LIMINE AND/OR MOTION FOR SUMMARY JUDGMENT

This matter is before the court on a Motion in Limine and/or Motion for Summary Judgment (Doc. No. 27) filed by defendant, the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College (LSU). Plaintiff, Kiki Ikossi-Anastasiou, has filed opposition. Jurisdiction is alleged based on federal question, 28 USC 1331. There is no need for oral argument.

BACKGROUND

On November 27, 2000, plaintiff field this suit, alleging discrimination based on sex, resulting in constructive discharge, failure to promote, and the unequal provision of pay, benefits and other terms and condition of employment in violation of Title VII of the Civil Rights Act of 1964, 42 USC 2000e, et.seq; Title IX of the Education Amendments of 1972, Sec. 901 et.seq., as amended 20 USC 1681 et seq; the Equal Pay Act, 29 USC 206(d), et.seq. ("Equal Pay"); and the Louisiana Employment Discrimination Law.

Plaintiff earned her Ph.D. in Electrical and Computer Engineering from University of Cincinnati in 1986. She alleges that, in 1990, she began her employment as a faculty member in LSU's Department of Electrical and Computer Engineering. In 1996, plaintiff became a tenured professor at LSU.

For the school year 1997-98, plaintiff requested and was granted a one-year sabbatical leave of absence from LSU. While on sabbatical leave, plaintiff worked on her ongoing research with the Naval Research Laboratory and continued to draw half her regular salary and benefits from LSU. While still on sabbatical leave, plaintiff's son became very ill and she requested an additional year of unpaid medical leave in order to care for her son. LSU granted the leave for only twelve weeks (August, 1998 – December, 1998) and requested that plaintiff resume teaching in January of 1999.[1] The Spring, 1999 semester was to begin on January 12, 1999.

In January, 1999, plaintiff again requested leave for the Spring, 1999 semester because her son's medical condition had not improved. In January, 1999, plaintiff was informed that if she did not resume her duties on January 12, 1999, LSU would consider her to have abandoned her position.[2] Plaintiff did not return to work, and LSU notified plaintiff by a January 29, 1999 letter that

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[1] See Defendant's Exhibit D.

[2] See Defendant's Exhibit F.

LSU considered plaintiff to have abandoned her position effective as of the beginning f the Spring, 1999 semester (January 12).[3]

On October 26, 1999, plaintiff sent a letter to the Equal Employment Opportunity Commission, requesting that the letter be considered her official complaint for discrimination of the basis of gender and national origin against LSU[4] and, as previously stated, on November 27, 2000, plaintiff filed with complaint with the court. LSU's motion in limine or in the alternative, motion for summary judgment, now seeks to have the court restrict plaintiff from the introduction of evidence on plaintiff's time-barred claims or summary judgment in favor of LSU, dismissing plaintiff's claims. The court will review this as a motion for summary judgment.

SUMMARY JUDGMENT

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of fact and that the moving party is entitled to judgment as a matter of law.[5] The party seeking summary judgment bears the initial burden of setting forth the basis for its motion and identifying the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, which it

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[3] Defendant's Exhibit I.
[4] Defendant's Exhibit M.
[5] Fed.R.C.P. 56(c).

believes demonstrate the absence of a genuine issue of material fact.[6] Once a proper motion has been made, the non-moving party may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing the existence of a genuine issue of fact for trial.[7] Factual questions and inferences are viewed in the light most favorable to the nonmovant.[8] Summary judgment is mandated if the nonmovant fails to make a showing sufficient to establish the existence of an element essential to its case on which it bears the burden of proof at trial.[9]

DISCUSSION

TITLE IX CLAIM

Plaintiff alleges that LSU discriminated against her based on sex in violation of Title IX of the Educational Amendments of 1971. LSU contends that plaintiff's claims under Title IX are time-barred.

Title IX prohibits discrimination on the basis of sex by educational organizations that receive federal funds.[10] The Supreme Court held that Title IX is enforceable through an implied right of

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[6] *Celotex Corp. vs Catrett*, 477 US 317, 323, 106 S Ct. 2548, 91 L.Ed.2d 265 (1986)

[7] Id., at 322-23

[8] *Rogers vs International Marine Terminals, Inc.*, 87 F. 3d 755, 758 (5th Cir. 1996)

[9] *Celotex*, 477 US at 322

[10] See 20 USC 1681(a)

action.[11] Since Title IX does not contain a statute of limitations, however, the court must apply the "most appropriate or analogous state statute of limitations."[12]

Plaintiff's Title IX claim alleges sex discrimination. In Louisiana, the courts apply the one year limitation period applicable to delictual actions to sex discrimination claims.[13] Hence, the court will apply a one year prescriptive period to this Title IX claim. Further, the Fifth Circuit has held that in civil rights cases, a cause of action commences when the plaintiff "knows or has reason to know of the injury which is the basis for the action."[14]

In the case at hand, all of the events related to plaintiff's termination occurred on or prior to January 12, 1999, the effective date of her termination. Around August or September of 1998, plaintiff was notified by letter that her request for leave for the Spring, 1999 semester has been denied. Thus, plaintiff was aware of the injury which is the basis for her action as early as August/September, 1998. In addition, in a January 15, 1999 letter, plaintiff expressed her belief that the present and past actions taken against her by

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[11] See *Cannon vs University of Chicago*, 441 US 677, 709, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)

[12] *Goodman vs Lukens Steel Co.*, 482 USC 656, 660, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987)

[13] See LSA-C.C. art. 3492; *Buck vs Vermillion Parish School Board*, 783 So. 2d 583 (La. App. 3rd Cir. 3/28/01)

[14] *Kline vs N. Tex. State Univ.* 782 F 2d 1229, 1232 (5th Cir. 1986)(internal quotations omitted).

LSU were related to the fact that she was a female. However, plaintiff did not file her complaint until November 27, 2000 – well after the one-year prescriptive period began in August/September of 1998. Accordingly, the court concludes that plaintiff's claim of sex discrimination under Title IX is time-barred.

LOUISIANA EMPLOYMENT DISCRIMINATION ACT

Plaintiff also alleges sex discrimination under the Louisiana Employment Discrimination Act. LSU contends that plaintiff's claims under the Louisiana Employment Discriminations Act have also prescribed.

In Louisiana, discrimination based on sex is prohibited.[15] As previously stated, the prescriptive period for claims brought under Louisiana anti-discrimination statutes is one year.[16] This one year prescriptive period begins to run from the date of notice of termination.[17] LSA-R.S. 23:303(D) also provides that prescription may be suspended for a period of no more than six months during the pendency of an investigation of the claim by the EEOC or the Louisiana Commission on Human Rights.

In the instant matter, plaintiff was denied additional leave in August/September 1998

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[15] LSA-R.S. 23:1006(A)(1); 51:2231

[16] LSA-C.C. art. 3492; *Williams vs Conoco, Inc.*, 860 F. 2d 1306, 1307 (5th Cir. 1988)

[17] *Eastin vs Entergy Corp.*, 865 So. 2d 49, 54 (La. 2/6/04)

(termination effective January 12, 1999 and notification by letter dated January 29, 1999). According to Section 23:303(D), plaintiff had one year from that date within which to file her claim, i.e. t August/September, 1999. Plaintiff also filed a claim with the EEOC, which suspended prescription on plaintiff's claim for a period of not more than six months.[18] This action extended the period within which plaintiff could file her claim to February/March, 2000. However, plaintiff did not sue LSU until November, 2000, well beyond the one-year prescriptive period and the six-month suspension period. Therefore, plaintiff's claim under the Louisiana Employment Discrimination Act is also time-barred.[19]

TITLE VII CLAIM

LSU contends that plaintiff's Title VII claim is time-barred and without merit. Pursuant to Title 42 USC 2000e-5(e)(1), a plaintiff may commence a civil action in federal court under Title VII only after she has filed a charge with the Equal Employment Opportunity Commission within 180 days of the alleged unlawful act, or within 300 days

[18] LSA-R.S. 23:303(D)

[19] See e.g. *Langley vs Pinkerton's Inc.*, 220 F.Supp. 2d 575, 581-82 (M.D. La. 2002)(finding that notwithstanding eighteen-month EEOC investigation, plaintiff's Louisiana employment discrimination claim has prescribed because Section 23:303(D) suspended prescriptive period only for six of the eighteen months)

of the act if the plaintiff first files with a state or local agency.[20]

In the case at hand, plaintiff complains that LSU denied her leave request and terminated her because of her sex. LSU denied plaintiff's request for additional unpaid leave for the Spring, 1999 semester in an August 26, 1998, letter, and gave her notification that her failure to return would be treated as an abandonment of her position in a January 7, 1999 letter. Nevertheless, plaintiff did not file a charge with the EEOC until her October 26, 1999 letter which was received by the EEOC on November 2, 1999. Thus, the denial of plaintiff's leave request occurred over 400 days from the date of her EEOC complaint. Plaintiff's Title VII claims are time-barred.

The court reaches this conclusion even though the effective date of plaintiff's termination, January 12, 1999, and the January 29, 1999 letter confirming plaintiff's termination occurred within the 300-day period. The court finds that these dates are not the operative dates from which the 300-day period begins to run. In *Delaware State College vs Ricks*, the Supreme Court stated that "the relevant inquiry is when [the employer] may be considered to have 'established its official position – and made that position apparent' to [the plaintiff]."[21] Thus, at the latest, the plaintiff knew in September, 1998, based on the August, 1998

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[20] See 42 USC 2000e-5(e)(1); *Dao vs Auchan Hypermarket*, 96 F. 3d 787, 789 (6th Cir, 1996).

[21] 449 US 250, 262, 101 S.Ct. 498, 66 L.Ed 2d 431 (1980).

letter from LSU that her leave request was denied. Clearly, this action (denial of leave because of plaintiff's sex) would have been an immediate act of discrimination. Thus, the delayed discharge would not be a discrete act of discrimination, but an inevitable consequence of the earlier decision denying plaintiff's leave and requiring plaintiff to return to work in January of 1999. Consequently, no discrete discriminatory act took place within the 300-day period and, as previously stated, these claims are time-barred.

UNEQUAL PAY

LSU contends that plaintiff's unequal pay claims asserted under the Equal Pay Act, 29 USC 206 are time-barred. LSU contends that plaintiff's cause of action, if any, under the Equal Pay Act accrued in May, 1997 (or at least prior t August, 1997, when her sabbatical leave commenced) with her last paycheck from LSU for work she actually performed. LSU further contends that plaintiff was required to file her Equal Pay ACT SUIT ON OR BEFORE May or August, 2000 to avoid being entirely time-barred.

An individual suing under the Equal Pay Act must file her complaint within two years after the cause of action accrues or within three years if the defendant acted "willfully."[22] To establish a prima

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[22] 29 USC 216 and 255(a); See *Lusted vs San Antonio Independent School District*, 741 F. 2d 817, 822 (5th Cir. 1984).

facie case under the Equal Pay Act, a plaintiff must show that: (1) the employer is subject to the Act; (2) she performs in a position requiring skill, effort, and responsibility substantially equal to the performed by the male comparators; and (3) that she is paid less than the male comparators.[23] Plaintiff must also show that she performed her work under similar conditions. [24]A separate Equal Pay Act violation accrues with the alleged underpayment on each regular pay day.[25]

During the one year sabbatical leave (1997-1998 school year), plaintiff only drew half of her regular salary and benefits from LSU. The last time that plaintiff would have worked under similar working conditions as her male comparators then, would have been prior to August, 1997. Further, the last time that plaintiff would have performed in a position requiring skill, effort, and responsibility substantially equal to that performed by the male comparators would also have been prior to August, 1997. Clearly, during her sabbatical leave, plaintiff was not in a position to compare her pay and work performance to her male counterparts. Therefore, plaintiff has until May or August, 2000, to file her unequal pay claim. However, the claim was not filed until November, 2000. Plaintiff's unequal pay claim is time-barred.

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[23] See *Jones vs Flagship Int'l*, 793 F.2d 714, 722-23 (5th Cir.) cert. denied 469 US 1065 (1987).

[24] See Id.

[25] *Hodgson vs Behrens Drug Co.*, 475 F. 2d 1041, 1050 (5th Cir. 1973).

Accordingly,

IT IS ORDERED that the Motion for Summary Judgment filed by defendant, the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, is GRANTED. The case will be dismissed.

Baton Rouge, Louisiana, this 26th day of September, 2006.

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Ralph E. Tyson, Chief Judge
United States District Court
Middle District of Louisiana

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

Kiki Ikossi-Anastasiou v. Bd. of Supervisors of La. State Univ.,
Civil Action No. 00-883
September 26, 2006

JUDGMENT

For the written reasons assigned and filed herein:

IT IS ORDERED ADJUDGED AND DECREED the defendant's motion for summary judgment is GRANTED and this action is hereby dismissed.

All other pending motions in this action are hereby dismissed, as moot.

Baton Rouge, Louisiana, September 26, 2006.

Ralph E. Tyson, Chief Judge
Middle District of Louisiana

STATUTES INVOLVED

29 USC 206(d) provides, in pertinent part:

> (d) Prohibition of sex discrimination.
>
> (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.
(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this Act [29 USCS §§ 201 et seq., generally; for full classification, consult USCS Tables volumes].

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, or dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 USC 255(a) provides:

> Any action commenced on or after the date of the enactment of this Act [enacted May 14, 1947] to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—
>
> (a) if the cause of action accrues on or after the date of the enactment of this Act [enacted May 14, 1947]--may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

5 C.F.R. 551.104 provides, in pertinent part:

> In this part –
>
> > Reckless disregard of the requirements of the Act means failure to make adequate inquiry into whether conduct is in compliance with the Act.